Submitted April 7, 79

Judge Swayne

Date 1878 Oct. 2. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 216.

THE UNITED STATES, PLAINTIFFS,

vs.

CHARLES N. GERMAINE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED OCTOBER 11, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 216.

THE UNITED STATES, PLAINTIFFS,

vs.

CHARLES N. GERMAINE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

INDEX.

	Original.	Print.
Certificate of division	1	1
Indictment	4	1
Clerk's certificate	8	3

1 UNITED STATES OF AMERICA,
District of Maine, ss:

Circuit court of the United States, first circuit. September term, 1876.

THE UNTED STATES, BY INDICTMENT,
vs.
CHARLES N. GERMAINE.

This was a proceeding by indictment against the defendant for violation of the act of March 3, 1825, section 12, 4 Statutes at Large, page 118.

The indictment was found at the December term, 1873, of the district court for the district of Maine, and, on motion of the district attorney, was remitted to the circuit court.

The defendant was a civil surgeon, appointed by the Commissioner of Pensions under the act of March 3, 1873, section 35 (17 Statutes at Large, page 576). The offence charged in the indictment was extorsively taking fees and compensation from pensioners for making examinations for which he was paid by the United States.

2 The defendant demurred to the indictment, having first obtained leave to plead further if the demurrer should be overruled.

The indictment, demurrer, and joinder are to be copied and made part of this case.

The cause was argued on the demurrer, at this term of this court, before Judges Clifford and Fox, and at the hearing the following questions occurred, to wit:

I. Whether the defendant, by virtue of such appointment as a civil surgeon to make periodical examinations of pensioners, is an officer of the United States within the meaning of the act of Congress, and liable to indictment for extortion under said act.

II. Whether judgment should be rendered for the government or for the defendant upon the pleadings in said cause.

Upon which questions the judges of said circuit court were opposed in opinion; and thereupon, on motion of the district attorney for
3 and in behalf of the United States, it was ordered that the said questions, upon which the said judges were so opposed, should be certified, under the seal of the court, to the Supreme Court of the United States, at their next session, for a final decision.

NATHAN CLIFFORD,
Associate Justice Supreme Court of the United States.
EDWARD FOX,
Judge of the District Court of Maine.

4 *Copy of indictment.*

UNITED STATES OF AMERICA,
Maine District, ss:

At a district court of the United States of America for the district of Maine, begun and held at Portland, within and for said district, on the first Tuesday of December, in the year of our Lord one thousand eight hundred and seventy-three.

The grand jurors of the United States of America for the district of Maine aforesaid, on their oath present that Charles N. Germaine, of Rockland, in said district of Maine, physician, on the thirteenth day of

August, in the year of our Lord eighteen hundred and seventy-three, at Rockland, in said district of Maine, was an officer of the United States, to wit, a civil surgeon, appointed by the Commissioner of Pensions to make the periodical examinations of pensioners which are or may be required by law, and to examine applicants for pension, and then and there exercised the functions of said office, and then and there one Thomas G. Dunscomb, a pensioner, applied and submitted
5 himself for examination to said Charles N. Germaine as such examining surgeon, and the said Charles N. Germaine then and there, in his official capacity aforesaid, did make an examination of the said Thomas G. Dunscomb, and for said examination did then and there wilfully, corruptly, and extorsively demand and receive from said pensioner as a fee for said examination the sum of two dollars; and so the jurors aforesaid, on their oath aforesaid, do present that Charles N. Germaine, of Rockland, in the district of Maine, at said Rockland, in the district of Maine, on the thirteenth day of August, in the year of the Lord one thousand eight hundred and seventy-three, was, as aforesaid, an officer of the United States, and was then and there in manner aforesaid guilty of extortion, under and by color of his office, against the peace and dignity of the United States, and contrary to the form of the statute of said United States in such case made and provided.

A true bill.

GEORGE H. SNOW,
Foreman of the Grand Jury.

NATHAN WEBB,
Attorney of the United States for the District of Maine.

6 *Demurrer.*

U. S. circuit court.

UNITED STATES
vs.
CHARLES N. GERMAINE.

And the said Charles N. Germaine cometh into court here, and having heard the said indictment read, and having, with the consent of the district attorney, reserved the right of pleading over in the event of the overruling of this his demurrer, saith that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said Charles N. Germaine, is not bound by the law of the land to answer the same: Wherefore, for want of a sufficient indictment in this behalf, the said Charles N. Germaine prays judgment, and that by the court he may be dismissed and discharged from the said premises in said indictment specified.

By his attorney.

T. B. REED.

Joinder.

And Nathan Webb, district attorney, who prosecutes for the said United States in this behalf, says that the said indictment and
7 the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said Charles N. Germaine to answer the same, and the said Nathan Webb, who prosecutes as aforesaid, is ready to verify and prove the same

as the court here shall direct and award: Wherefore, inasmuch as the said Charles N. Germaine hath not answered to the said indictment nor hitherto in any manner denied the same, the said Nathan Webb, who prosecutes as aforesaid, prays judgment, and that the said Charles N. Germaine may be convicted of the premises in said indictment specified.

NATHAN WEBB,
Att'y for the U. S. for Dist. of Maine.

MAINE DISTRICT, *ss:*

C. C. U. S. September 22, 1876.

Entered and filed.
Attest:

A. H. DAVIS, *Clerk.*

8 UNITED STATES OF AMERICA.

DISTRICT OF MAINE, *ss:*

Office of the Clerk of the Circuit Court of the United States:

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, hereby certify that the foregoing contains a true and perfect copy, as of record, of the proceedings of said court in the matter of United States, by indictment, vs. Charles N. Germaine, together with the indictment and pleadings therein referred to.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this twenty-second day of September, A. D. 1876.

[SEAL.] A. H. DAVIS, *Clerk.*

(Indorsed:) The United States, by indictment, vs. Charles N. Germaine. Copy of record for U. S. circuit court for district of Maine.

(Indorsement on cover:) No. 216. The United States, plaintiffs, vs. Charles N. Germaine. Certificate of division. Maine C. C. U. S. Filed 11th October, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
vs.
CHAS. N. GERMAINE. } No. 216.

Division of Opinion in U. S. Circuit Court for Maine.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
vs.
CHAS. N. GERMAINE. } No. 216.

Division of Opinion in U. S. Circuit Court for Maine.

BRIEF FOR THE UNITED STATES.

STATEMENT.

At the December term, 1873, of the United States district court for Maine, the grand jurors, "on their oath, present that Charles N. Germaine, of Rockland, in said district of Maine, physician, on the 13th day of August, A. D. 1873, at Rockland, in said district of Maine, was an officer of the United States, to wit, a civil surgeon, appointed by the Commissioner of Pensions to make the periodical examination of pensioners which are, or may be, required by law, and to examine applicants for pension, and then and there exercised the functions of said office; and then and there one Thomas G. Dunscomb, a pensioner, applied and submitted himself for examination to said Charles N. Germaine, as such examining-surgeon, and the said Charles N. Germaine then and there, in his official capacity

aforesaid, did make an examination of the said Thomas G. Dunscomb, and for said examination did then and there wilfully, corruptly, and extorsively demand and receive from said pensioner, as a fee for said examination, the sum of two dollars; and so the jurors aforesaid, on their oath aforesaid, do present that Charles N. Germaine, of Rockland, in the district of Maine, at said Rockland, &c., on the 13th day of August, A. D. 1873, was, as aforesaid, an officer of the United States, and was then and there, in manner aforesaid, guilty of extortion, under and by color of his said office, against the peace," &c. (Record, 1, 2.)

The foregoing indictment, which was remitted to the circuit court, is founded upon the act of March 3, 1825, sec. 12, by which it is enacted "that if any *officer of the United States* shall be guilty of extortion under or by color of his office, every person so offending shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, according to the aggravation of the offence." (4 Stats., 118, sec. 12; see R. S., sec. 5481.)

The defendant was a civil surgeon, appointed by the Commissioner of Pensions under the act of March 3, 1873, sec. 35, which provides, "That the Commissioner of Pensions be and he is hereby empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are, or may be, required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such

examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, *which shall be paid by the agent for paying pensions* in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe." (17 Stats., 576, sec. 35—incorporated in R. S., sec. 4777.)

A demurrer was filed to this indictment and joined. Upon argument of the demurrer, the following questions arose, upon which the judges were divided in opinion, and they are therefore certified here:

"I. Whether the defendant, by virtue of such appointment as a civil surgeon to make periodical examinations of pensioners, is an officer of the United States within the meaning of the act of Congress, and liable to indictment for extortion under said act.

"II. Whether judgment should be rendered for the Government or for the defendant upon the pleadings in said case." (Record, 1.)

BRIEF.

I.

Was Dr. Germaine *such* an officer as is liable to indictment under the act of March 3, 1825, sec. 12?

1st. Clearly he was *an* officer of the United States.

He held an *office*; and he held it under federal laws and appointment.

"An office is defined to be a public charge or employment; and he who performs the duties of the office

is an officer. If employed on the part of the United States, he is an officer of the United States. * * * If a duty be a continuing one, which is defined by rules prescribed by the Government, and not by contract, which an individual is appointed to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." (Marshall, C. J., in U. S. *v.* Maurice, 1 Brockb., 102, 103.)

If that opinion is sound, Dr. Germaine was a federal officer.

The existing constitution of Ohio ordains that "no person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector." In a recent case, (A. D. 1876,) the definitions of the word "office" are given, the above citation from Judge Marshall approved, and it is declared that the place of medical superintendent of the insane-hospital is an office within the meaning of the above-quoted clause of the constitution. (State *v.* Wilson, 29 Ohio St., 347, *et seq.*)

Not only is the office created by federal law, to subserve a national purpose, but the compensation for the performance of its duties is expressly made payable "out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe." (17 Stats., 576; R. S., sec. 4777.)

This is because the examination is for the benefit of the Government. The person examined must necessarily have been a soldier, disabled (to a greater or less extent) by injuries received while in the service. Only upon proof of these facts is he entitled to a pension certificate. The expense of making out his case, in the first instance, is borne by the claimant; but when he has done this, and it is attested by the delivery of the certificate, his right would fairly be deemed to continue unless proof were adduced to show it had ceased. Therefore, to prevent this ordinary legal presumption from working an actual injustice to the United States, the Government provides for an examination of pensioners at its own expense.

2d. Was Dr. Germaine *such* an officer as to be liable to indictment under the act of March 3, 1825, sec. 12?

The title of that act is "more effectually to punish certain crimes against the United States, and for other purposes." (4 Stats., 115,) being supplementary to the crimes act of April 30, 1790, and to provide for offences not therein legislated against.

Examining this act of 1825, section by section, it will be perceived that the first three sections relate to offences against the property of the United States, or to those committed in *places* over which the federal jurisdiction is exclusive: they do not at all concern any peculiar relation of the offender to the Government. "If *any* person" shall do the prohibited act; or if *any* offence shall be committed within the place designated, the

is an officer. If employed on the part of the United States, he is an officer of the United States. * * * If a duty be a continuing one, which is defined by rules prescribed by the Government, and not by contract, which an individual is appointed to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." (Marshall, C. J., in U. S. *v.* Maurice, 1 Brockb., 102, 103.)

If that opinion is sound, Dr. Germaine was a federal officer.

The existing constitution of Ohio ordains that "no person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector." In a recent case, (A. D. 1876,) the definitions of the word "office" are given, the above citation from Judge Marshall approved, and it is declared that the place of medical superintendent of the insane-hospital is an office within the meaning of the above-quoted clause of the constitution. (State *v.* Wilson, 29 Ohio St., 347, *et seq.*)

Not only is the office created by federal law, to subserve a national purpose, but the compensation for the performance of its duties is expressly made payable "out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe." (17 Stats., 576; R. S., sec. 4777.)

This is because the examination is for the benefit of the Government. The person examined must necessarily have been a soldier, disabled (to a greater or less extent) by injuries received while in the service. Only upon proof of these facts is he entitled to a pension certificate. The expense of making out his case, in the first instance, is borne by the claimant; but when he has done this, and it is attested by the delivery of the certificate, his right would fairly be deemed to continue unless proof were adduced to show it had ceased. Therefore, to prevent this ordinary legal presumption from working an actual injustice to the United States, the Government provides for an examination of pensioners at its own expense.

2d. Was Dr. Germaine *such* an officer as to be liable to indictment under the act of March 3, 1825, sec. 12?

The title of that act is "more effectually to punish certain crimes against the United States, and for other purposes." (4 Stats., 115,) being supplementary to the crimes act of April 30, 1790, and to provide for offences not therein legislated against.

Examining this act of 1825, section by section, it will be perceived that the first three sections relate to offences against the property of the United States, or to those committed in *places* over which the federal jurisdiction is exclusive: they do not at all concern any peculiar relation of the offender to the Government. "If *any* person" shall do the prohibited act; or if *any* offence shall be committed within the place designated, the

punishment shall be as there prescribed. The fourth section punishes murder within the maritime jurisdiction of the United States, while the next gives cognizance to the circuit court of *any* offence committed on board of an American vessel in a foreign port. The sixth, seventh, eighth, and ninth sections punish the crimes mentioned if committed by *any* person within the maritime jurisdiction of the United States; the tenth punishes *any* shipmaster who forces any officer or mariner of his vessel on shore, &c.; and the eleventh, *any* person who sets fire to a public ship within admiralty jurisdiction. Then comes the section in question, relating to "*any* officer of the United States" who is guilty of extortion in office.

The purpose of going over the sections *seriatim* is to show that the whole statute is expressed in general terms, to indicate the penalty affixed to certain acts which, either by situs or by the relation of the National Government to the person or property injured or offending, come properly under its cognizance, by whomsoever committed. In this twelfth section the authority arises because of the relation of the criminal to the United States. The liability to punishment is coexistent and coextensive with that relation, and not limited by any qualification of the terms or tenure of the office filled, or of the duties to be performed. Nearly all the succeeding sections will be found to be equally general in their expression and application.

In construing the act of March 3, 1797, sec. 5, (1 Stats., 515,) which gives to the United States, as creditor, priority, "where any revenue officer, *or other per-*

son, hereafter becoming indebted to the United States" shall become insolvent, this court, per Marshall, C. J., held that this general expression extended the preference to the case of insolvent private citizens owing the Government, although the title of the act and its preceding sections related exclusively to the receivers of public money. (U. S. *v.* Fisher, 2 Cranch, 358 to 398.)

In that opinion it is said: "The title of the act is unquestionably limited to receivers of public money; a term which undoubtedly excludes the defendant in the present case. The counsel for the defendants have also completely succeeded in demonstrating that the first four sections of this act relate only to particular classes of debtors, among whom the drawer and endorser of a protested bill of exchange would not be comprehended. Wherever general words have been used in these sections they are restrained by the subject to which they relate, and by other words frequently in the same sentence, to particular objects, so as to make it apparent that they were employed by the legislature in a limited sense. Hence it has been argued with great strength of reasoning, that the same restricted interpretation ought to be given to the fifth section likewise. If the same reason for that interpretation exists; if the words of the act generally, or the particular provisions of this section afford the same reason for limiting its operation which is afforded with respect to those which precede it, then its operation must be limited to the same objects." The judge proceeds to show "that the fifth section relates entirely to the priority claimed by the United States in the payment of debts," and its language there-

fore extends to include every debtor to the Government. (2 Cranch, 387, *et seq.*)

The purpose of this citation is to show that, even where the title and general scope of preceding provisions of an act tend to restrict the application of terms employed, yet if in the very section where the language is used, there is nothing to limit the force of a comprehensive expression, and the subject of that section would justify the extended application, the full and ordinary meaning of the words is the one adopted.

In this act of March 3, 1825, however, there is nothing from title to approval to indicate that any narrowing of the most extensive interpretation is intended.

The object which that act was designed to accomplish is in harmony with the effort made in this indictment: to punish a public officer who takes advantage of his position to exact money wrongfully from one compelled to deal with such functionary in the discharge of his official duties. This is extortion; defined by Blackstone as "the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due." (4 Bl. Com., *141.)

There is the strongest reason for presuming a legislative intent to cover cases like the present; not only because the defendant is a public officer, but because the party defrauded and oppressed is peculiarly under the protecting care of the Federal Government. In the same chapter (six) of the Revised Statutes, entitled "Official Misconduct, &c.," of which this (5481) is the

opening section, because it is the most comprehensive, are found others punishing any person (who may or may not be an officer) prosecuting a pension claim for demanding fees in excess of those authorized by law, and any pension agent who "receives any fee or reward from any pensioner for any service in connection with the payment of his pension." Secs. 5485, 5487; and sec. 5486 punishes a guardian who embezzles his ward's pension. (U. S. *v.* Hall, No. 687 of present term, decided January 27.)

The *power* to punish for taking excessive fees of a pensioner is not here drawn in question. (Morgan *v.* Davis, 47 Vt., 614; U. S. *v.* Fairchilds, 1 Abb. U. S. Cts., 74; U. S. *v.* Marks, 2 Abb. U. S. Cts., 432–5; U. S. *v.* Bennett, 12 Blatch., 351.) The sections relating to the punishment of such exaction by an attorney or pension agent are referred to as showing the intent of Congress.

It is certainly as injurious to the pensioner and as prejudicial in its tendency towards the United States to have the examining-surgeon demand an illegal and excessive fee, as the condition of granting an indispensable certificate, as it is to have an attorney exact it for his services. Indeed, the injury to the Government is greater and more dangerous.

It is the abuse of the "peculiar power" attached to the office that is the gravamen of the offence. (2 Bish. Cr. Law, sec. 390, and the earlier sections there cited, &c.)

Thus we have the general language of the law, employed in its common and most obvious meaning, the reason of the statute, the public mischief to be guarded against, and the existence of kindred legislation, all

tending to establish that construction which will render the defendant amenable to the penalties denounced against extortion by a public officer of the United States.

This is in accordance with the wide sweep of the common law, which "has not confined this offence to any class of officers; but *wherever it has cast official duties*, and conferred official privileges, it has subjected the individual to liability for acts of extortion." (2 Bish. Cr. Law, sec. 392, and cases cited.)

"When the law imposes on an individual a ministerial office, then disobedience to the requirements of that law, in respect to such office is indictable." (2 Wharton, Cr. Law, sec. 2513.)

Of course the *amount* exacted is immaterial. In Com. *v.* Bagley, 7 Pick., 279, it was 40 cents; in a New York case, it was 12½ cents; People *v.* Whaley, 6 Cowen, 661; in a Pennsylvania case, it was 18¾ cents, Simmons *v.* Kelley, 33 Penn. St., 190; and in most of those reported, it was very small. (State *v.* Cross, 1 Yerger, 261.)

II.

Which party is entitled to judgment upon the pleadings?

Accepting the premise that Dr. Germaine was such a public officer as to be liable to punishment if guilty of extortion, the indictment sets out with sufficient precision all the facts (admitted by demurrer) to constitute the offence.

Its definition by Blackstone, before given, is the same

substantially as that of other writers on criminal law. (1 Bish. Cr. Law, sec. 573, and cases cited.) Bishop also says: "It is the corrupt demanding or receiving by a person in office of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger sum than the law justifies, or a fee not due." (2 Bish. Cr. Law, sec. 390, and citations; 1 Russell on Crimes, (5th Eng. ed.,) 303, 304; Com. *vs.* Mitchell, 3 Bush, 26.)

All that is required for the sufficiency of an indictment is that the facts charged, if true, establish the commission of the offence. It need contain no recital of the statute, which is presumed to be as well known to the respondent as to the court.

In this case the statute fixed the compensation at two dollars, to be received from the Government through the pension agent. Nothing was due or payable from the pensioner. Yet the indictment charges that, at a time and place specified, and within the cognizance of the court, the respondent named, holding the office indicated, in the exercise of its functions, examined Thomas G. Dunscomb, declared to be a pensioner, and for that examination corruptly demanded and received from Dunscomb the sum of two dollars. As the law provides that the surgeon shall receive his fees from the pension agent, and not from the pensioner, this shows the precise sum exacted, from whom it was taken, by whom, when and where, and that it was done wilfully, corruptly, and extorsively, and not through inadvertence, nor was it voluntarily given.

If these allegations are insufficient to sustain the indictment, I am at a loss to see where the loophole of escape is, and must therefore postpone further remark until I see the respondent's brief.

EDWIN E. SMITH,
Assistant Attorney General.

Supreme Court of the United States.

UNITED STATES, *by Indictment*,

v.

CHARLES N. GERMAINE,

On certificate of division of opinion from the Circuit Court of the United States for the District of Maine.

BRIEF OF DEFENDANT.

C. N. GERMAINE, *pro se.*

Supreme Court of the United States.

OCTOBER TERM, 1874.

UNITED STATES *v.* GERMAINE.

Argument for Defendant.

The defendant ~~in his own behalf~~ craves leave to present in print, for the consideration of the court, the observations which were addressed to the Circuit Court.

The indictment in this case is founded upon a Statute punishing an "officer of the United States" for certain acts. Unless the defendant be an "*officer*" of the United States, he is not within the purview of the Statute, and it can make no difference what his relations are to the United States if he be not an "*officer*."

Statute 3 March, 1825, § 12, (4 Statutes, 118).

Both sides desire to meet the question fairly, and it is admitted by both that the President has neither appointed nor commissioned the defendant, nor any

of the class of employés—viz: examining surgeons—to which he belongs.

It becomes then important to ascertain what things are *essential* to constitute an "officer of the United States." The United States may employ many men for various purposes and in various ways, and yet no one of them be an "officer."

There are certain provisions of the Constitution which are directly applicable to this question.

Article II, Sec. II. 2. * * * * * "and he [the President] shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all* other *officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

By this provision, *all officers* of the United States must be appointed by the President, or by a court of law, or by the head of a department. If, then, by any law of Congress, an employé is to be appointed or designated in any other way, one of two things must follow.

1st. The employé so designated and appointed is not to be deemed an "Officer of the United States," or

2d. The law is unconstitutional.

Applying these principles to the present case, the inquiry first in order is, was the defendant appointed

or, by law required to be appointed, by the President, or by a court of law or by a head of a department? In order to be an officer of the United States he must be appointed by one of them. It needs no argument to show that he was not appointed by the President or by a court of law, for that will be admitted by the United States, and is admitted by the allegations of the indictment. He was appointed by the Commissioner of Pensions. Is *he* the head of a department?

What constitutes the head of a department is not for us to define. It must be sufficient if we demonstrate that the Commissioner of Pensions is not the head of any department but only a subordinate of the Department of the Interior. By the act, 20 Jan., 1843, § 2, 5 Stat., 597, the Commissioner was to be appointed by the President, and to "execute under the direction of the Secretary of War and the Secretary of the Navy, such duties in relation to the various pension laws as may be prescribed by the President," etc. He was obviously not the Head of a Department then. In 1849, by the Act of the 3d of March, § 1, a "new executive department," called the "department of the interior," was established, and by § 6 of that act it was provided that,

"The Secretary of the interior shall exercise the super-
"visory and appellate powers now exercised by the Secre-
"taries of the war and navy departments in relation to all
"the acts of the Commissioners of Pensions," etc.

This act very clearly constitutes the Commissioner a subordinate to the Secretary, who is the head of the department. This is so plain that argument would

but obscure it. We purpose, then, merely to add a few passages from the Statutes, showing by inference what a department is.

In the act of July 4, 1836, § 12 (5 Statutes, 111), office hours are provided for in "the departments of the treasury, war, navy, State and general post office."

In the act establishing the Interior Department, the Secretary is to receive the same salary "as the Secretaries of the other executive departments."

By the act of March 3, 1853, § 3, "The clerks in the departments of the the treasury, war, navy, the *interior* and the post office" are classified, and the number of each class assigned to each specified; and in the specification which follows, the pension clerks are arranged under the *Interior* Department in the same manner as the subordinates are arranged under other departments.

See also act 26th August, 1842 (5 Stat., 525), § 17.

By act of May 31, 1854 (10 Statutes, 297), the documents of the Interior Department are certified, and in the indictment tried in the District Court against this defendant, the certificate of the Interior Department was deemed necessary by the District Attorney to authenticate papers from the pension office.

But the act of August 26, 1842, § 1, affords conclusive proof of the subordination of the *office* of the Commissioner of Pensions, while connected with the war department.

"It shall be lawful for the respective heads of the depart-

ments of the general government to employ or appoint the officers and persons hereinafter mentioned, in addition to those already provided by law in the offices, bureaus and places connected with their several departments, and at the following annual salaries, that is to say:

"*In the War Department.*

"In the *office* of the Commissioner of Pensions, one messenger, etc."

This was the Status of the Commissioner before 1849, and no one can say that it has been in any way changed since. Consequently, I may safely say from the foregoing citations, that examining surgeons are not appointed by the President, or any court of law, or any head of department.

Hence, it follows that the law is unconstitutional, or they are not officers. We do not deem it necessary to claim that the law is void because against the constitution; for in all probability, Congress never intended to make casual employés, like Examining Surgeons, "Officers of the United States."

In either event this indictment must fail, for it charges no crime.

It seems hardly needful to cite another constitutional provision, but there is another equally conclusive under the admissions of this case.

Art. II, Sec. III, in terms says, that the President "shall commission all the officers of the United States."

Now it is admitted, for the purposes of this case, and to determine the law, that no commissions by the Presi-

dent are issued to Examining Surgeons. To this state of things of course the same kind of argument must apply. If the defendant was not commissioned by the President he was not an officer, and if no commissions are issued in such cases, it must follow that in the opinion of the authorities at Washington, at least, Examining Surgeons are not Officers of the United States.

It would seem that the foregoing observations were amply sufficient to prove the proposition contended for by the defendant; but perhaps it may not be out of place to answer some suggestions which have been made, and will probably be made again, on behalf of the government.

It is said that in other places in the Statutes the word "officers" is used to designate persons who have not the constitutional essentials to constitute them "officers of the United States." Without dwelling on the difference between the expression "officers" and the full phrase "Officers of the United States," we content ourselves with denying broadly that such is the fact. The case of Deputy Marshals has been instanced, and it has been asked, can they extort and not be punished? Can they be resisted, and the offender not be punished? One answer to both these questions is, that a Deputy Marshal is an "Officer of the United States" under the principles which we have already established.

Under the Act of Sept. 24, 1789, a Deputy Marshal is appointed, "who shall be removable from office by the judge of the District Court or of the Circuit Court

sitting in the district, at the pleasure of either." In other words, the appointment must have the approbation of a judge of a court of law, or more exactly of both the District and Circuit judge, and in U. S. v. Hartwell, 6 Wall., 385 (pp. 394–5), it was held that an officer appointed by the assistant Treasurer, "with the approbation of the Secretary of the Treasury," was "appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing powers." [Const., Art. II, § 2.] But in the case at bar there can be no pretence that any head of department, court of law or executive can make or unmake, approve or remove an examining surgeon. If the case of U. S. v. Tinklepaugh be urged, we answer that not one word of the reasoning in that case can be applied to the case at bar; that the whole context of the Statute on which that case rested, shows that Deputy Marshals were included in the terms used, and that lastly, the point now raised was not raised in that case or thought of.

That decision was right, and had the point now under discussion been raised, good reasons might have been given. Other points were raised, and of course the reasoning of the court applied to them.

The case of U. S. v Hartwell, 6 Wall., 385, already cited, was urged in the argument before the Circuit Court as decisive of this. We regard it as an authority for us; for it recognizes with gratifying distinctness the necessity of compliance with Article II, § 2 of the

Constitution, to constitute an "officer of the United States."

"The defendant," says Judge Swayne, "was appointed by the head of a department within the meaning of the Constitutional provision upon the subject of the appointing power."

How? By the Act of July 23, 1866, the Assistant Treasurer at Boston was authorized, "*with the approbation of the Secretary of the Treasury*, to appoint, etc.

In a word, under the law as laid down in U. S. vs. Hartwell—and no one can complain that that case does not go far enough—*some* recognition of Art. II, § 2 of the Constitution of the United States is essential to the creation of an "officer of the United States."

But in this case there is no such thing. Nobody has any right to be consulted in this appointment, but the Commissioner of Patents; nor has any head of department, or court of law, or executive, any power to remove. If Congress had intended to make Examining Surgeons "officers of the United States," would it not have paid some slight attention to a plain Constitutional provision? If the court will examine the act of July 14, 1862, it will plainly perceive that nowhere in the act are the surgeons designated as "officers," and nowhere will the slightest pretext be found to sustain the position of the government.

To say that "officers of the United States" in the Constitution means one thing, and "officers of the

United States," in act March 3, 1825, § 9, means another and a different thing, is to juggle with words. There is nothing in the context to make any difference.

It is not anticipated that any argument will be urged that the case set out in the indictment is within the "mischiefs of the Statute," for it is taken for granted as elementary that "Penal Statutes are construed strictly against the subject, and favorably and equitably for him." 1 Hawk., P. C. 90, § 8. On the contrary, it is to be expected that all doubtful points will be ruled in his favor.

T. B. Reed

Berry, Pr.